Public Prosecutor v Sarjeet Singh & Anor

HIGH COURT (TAIPING) — CRIMINAL APPEAL NO 51-241-92(90)
ABDUL MALIK ISHAK JC
26 FEBRUARY 1994

Evidence *— Identification parade — No identification parade held — Accused unknown to complainant — Whether identification parade necessary — Effect of failure to hold identification parade*

Evidence *— Accomplice — Corroboration — Conviction based on uncorroborated testimony of accomplice — Whether illegal — Approach taken by the courts — Evidence Act 1950 s 133*

Evidence *— Accomplice — Corroboration — Accomplice giving evidence for the prosecution — Whether corroboration necessary for every factor of prosecution case — Whether corroboration only necessary for material parts of accomplice's evidence*

Evidence *— Accomplice — Credibility — Considerations to be taken into account*

Evidence *— Accomplice — Corroboration — Whether necessary where evidence was unreliable*

The respondents were tried jointly in the Magistrates' Court, Taiping on the charge of robbing a taxi driver, together with another accomplice named Mustafa bin Ali ('Mustafa'). Mustafa had earlier pleaded guilty, was convicted and later gave evidence for the prosecution. The magistrate found that Mustafa was an unreliable witness and acquitted the respondents. The prosecution appealed.

Held, dismissing the appeal:

(1) There was no evidence that the taxi driver knew the respondents prior to the robbery and the taxi driver did not at any time identify the respondents and Mustafa as the culprits. Where the accused persons are not previously known to the witnesses, it is necessary to hold an identification parade. Therefore, the police should have conducted an identification parade to enable the taxi driver to identify the robbers. The failure to do so gave rise to the suspicion that the taxi driver would not have been able to identify the respondents and Mustafa. The lack of an identification parade, though it may not vitiate the trial, is a very important feature in considering the credibility of witnesses on the point of identification.

(2) Mustafa had admitted that he had lied under oath and it was perfectly in order for the learned magistrate to hold him as an unreliable witness.

(3) As an accomplice, the court was entitled to presume that Mustafa was unworthy of credit unless corroborated in material particular. Although s 133 of the Evidence Act 1950 stipulates that a

conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the courts have consistently held that the grounds of decision must reflect an awareness of the danger of so convicting.

(4) Corroboration of an accomplice's evidence need not mean independent corroboration of every factor of the case against the accused. It is sufficient if the corroboration corroborates some material part of the accomplice's story which identifies the accused with the offence charged and goes towards the identity of the accused.

(5) The credibility of the accomplice must be individually judged just as any other witness, applying the same considerations but with the added ingredient of him being an accomplice. The court must take stock of the situation and consider who and what the witness is, his demeanour, bearing, the manner, quality and substance of his evidence in itself and in relation to all the circumstances of the case. Though Mustafa was an accomplice, he was still a competent witness and as such, his evidence must be weighed and examined and not just put aside unjudged and unconsidered.

(6) The magistrate had considered the evidence of Mustafa in its entirety and came to the conclusion that he was an unreliable witness, in which case the question of corroboration did not arise. The court could find no fault in that approach and the appeal was accordingly dismissed.

[Bahasa Malaysia summary

Responden telah dituduh bersesama di Mahkamah Majistret, Taiping atas tuduhan merompak seorang pemandu teksi, bersama seorang rakan sejenayah lain yang bernama Mustafa bin Ali ('Mustafa'). Mustafa telah terlebih dahulu membuat akuan bersalah, disabit dan kemudiannya memberi keterangan bagi pihak pendakwa. Majistret berpendapat bahawa Mustafa merupakan seorang saksi yang tidak boleh dipercayai dan membebaskan responden. Pihak pendakwa telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Tidak terdapat bukti bahawa pemandu teksi itu kenal responden sebelum rompakan itu dan pemandu teksi itu tidak pada sebarang masa mengecam responden dan Mustafa sebagai orang yang melakukan kesalahan itu. Di mana orang yang dituduh tidak sebelum itu dikenali oleh saksi-saksi, adalah perlu mengadakan suatu perbarisan cam. Oleh itu, pihak polis seharusnya mengadakan suatu perbarisan cam untuk membolehkan pemandu teksi itu mengecam perompaknya. Kegagalan untuk membuat demikian menimbulkan syak bahawa pemandu teksi itu tidak mungkin mengecam responden dan Mustafa. Ketiadaan suatu perbarisan cam, walaupun ianya tidak menjadikan perbicaraan itu tidak sah,

adalah suatu ciri yang sangat penting apabila mempertimbangkan kebolehpercayaan saksi-saksi mengenai perkara pengecaman.

(2) Mustafa telah mengaku bahawa beliau telah bercakap bohong atas sumpah dan adalah betul untuk majistret memutuskan bahawa beliau merupakan seorang saksi yang tidak boleh dipercayai.

(3) Sebagai seorang rakan sejenayah, mahkamah berhak menganggap bahawa Mustafa tidak boleh dipercayai kecuali jika beliau disokong dalam perkara yang penting. Walaupun s 133 Akta Keterangan 1950 menetapkan bahawa suatu sabitan tidak menjadi tidak sah hanya kerana ia berdasarkan testimoni seorang rakan sejenayah yang tidak disokong, mahkamah secara konsisten telah memutuskan bahawa alasan keputusan itu mesti menunjukkan kesedaran mengenai bahaya yang terlibat apabila membuat suatu sabitan sedemikian.

(4) Sokongan keterangan seorang rakan sejenayah tidak semestinya bermakna sokongan bebas mengenai setiap faktor kes itu terhadap tertuduh. Adalah mencukupi jika sokongan itu menyokong suatu bahagian material di dalam cerita rakan sejenayah itu yang mengaitkan tertuduh dengan kesalahan yang dituduh itu dan menolong mengesahkan identiti tertuduh.

(5) Kebolehpercayaan seorang rakan sejenayah mesti dihakimi secara berasingan, sama seperti saksi yang lain, dengan menggunakan pertimbangan yang sama tetapi dengan faktor tambahan iaitu bahawa beliau merupakan seorang rakan sejenayah. Mahkamah mesti membuat penilaian mengenai keadaan itu dan mempertimbangkan siapa dan apa saksi itu, tingkahlakunya, perawakan, jenis, kualiti dan isi keterangannya secara tersendiri dan berkaitan dengan kesemua keadaan kes itu. Walaupun Mustafa merupakan seorang rakan sejenayah, beliau masih merupakan saksi yang kompeten dan dengan demikian, keterangannya mesti dipertimbangkan dan diperiksa dan tidak diketepikan begitu sahaja tanpa dihakimi dan dipertimbangkan.

(6) Majistret telah mempertimbangkan keterangan Mustafa secara keseluruhannya dan membuat kesimpulan bahawa beliau merupakan seorang saksi yang tidak boleh dipercayai, dan di dalam kes sedemikian, soalan mengenai sokongan keterangannya tidak timbul. Mahkamah tidak boleh menyalahkan pendekatan yang diambil dan dengan demikian rayuan itu ditolak.]

Notes

For cases on corroboration of accomplice evidence, see 7 *Mallal's Digest* (4th Ed) paras 2–24; [1989] Mallal's Digest 768; [1991] Mallal's Digest 1064; [1992] Mallal's Digest 937.

For cases on corroboration of accomplice evidence, see 7 *Mallal's Digest* (4th Ed) para 875; [1989] Mallal's Digest 801–802; [1991] Mallal's Digest 1125.

Cases referred to

1 *R v Turnbull & Ors* [1976] 3 All ER 549; [1976] 3 WLR 445; (1976) 63 Cr App R 132 (folld)
2 *Mehtab Singh & Ors v State of Madhya Pradesh* AIR 1975 SC 274 (refd)
3 *Lajja Ram v State* AIR 1955 All 671; 1955 Cr LJ 1547 (refd)
4 *Awadh Singh v State* AIR 1954 Pat 483; 1954 Cr LJ 1546 (refd)
5 *Goh Khiok Phiong v R* [1954] MLJ 223 (refd)
6 *Abdul Rahman v PP* [1940] MLJ 55 (refd)
7 *Ng Yau Thai v PP* [1987] 2 MLJ 214 (refd)
8 *R v Baskerville* [1916] 2 KB 658 (folld)
9 *Sarwan Singh v State of Punjab* AIR 1957 SC 637 (folld)

Yong Zarida (Deputy Public Prosecutor) for the appellant.
Gurbachan Singh (*Bachan & Kartar*) for the first respondent.
R Ravindran (*Xavier, Ravi & Sarjit*) for the second respondent.

Abdul Malik Ishak JC: The respondents were tried jointly in the Magistrates' Court, Taiping, Perak on the following charges:

Sarjeet Singh a/l Halban Singh (TSA 71–9–86) and (TA(1) 92–244/87)

That you on 14 May 1986 at about 1.45am at Chinese cemetery area, 2½ milestone, Kamunting Road, Taiping, in the District of Larut and Matang, in the State of Perak, committed robbery of: (1) cash RM80; (2) a gold ring valued at RM150; and (3) a Seiko watch valued at RM30; the property of Lim Soon Eng KP 4257575, between the hours of sunset and sunrise and at the time of committing the said robbery you were armed with a deadly weapon, to wit, a knife and that you have thereby committed an offence punishable under s 392 of the Penal Code (FMS Cap 45) read together with s 34 of the same Code.

Roslan bin Ali (TA(1) 92–245/87)

That you jointly with two others, namely, Sarjeet Singh a/l Halban Singh and Mustafa Ja'afar who have already been dealt with, on 14 May 1986 at about 1.45am at Chinese cemetery area, 2½ milestone Kamunting Road, Taiping, in the District of Larut and Matang, in the State of Perak, committed robbery of: (1) cash RM80; (2) a gold ring valued at RM150; and (3) a Seiko watch valued at RM30; the property of Lim Soon Eng IC No 4257575, between the hours of sunset and sunrise, and at the time of committing the said robbery you were armed with a deadly weapon, to wit, a knife and that you have thereby committed an offence punishable under s 392 of the Penal Code (FMS Cap 45) read together with s 34 of the same Code.

The learned magistrate acquitted and discharged both the respondents at the close of the prosecution's case. The public prosecutor appealed against that order.

From the notes of proceedings, the following salient facts emerged.

Both the respondents and one Mustafa Ja'afar were army personnel attached to Sekolah Kor Perkhidmatan at Kamunting, Taiping, Perak. All three decided to commit robbery and towards this end, Sarjeet Singh

hatched a plan to rob a taxi driver near the Chinese cemetery — this plan was eventually agreed upon by all three of them. Thus, on 14 May 1986, all three proceeded to Taiping town and from there they hailed a taxi to return to Kamunting. Mustafa Ja'afar sat at the front of the taxi next to the taxi driver, while Roslan bin Ali sat behind Mustafa Ja'afar. Sarjeet Singh, on the other hand, sat behind the driver of the taxi. It was alleged by Mustafa Ja'afar (he pleaded guilty earlier on and was convicted and he gave evidence for the prosecution) that Sarjeet Singh was armed with a knife and with it he threatened the taxi driver, one Lim Soon Eng. Sarjeet Singh too was said to have relieved the taxi driver of cash amounting to RM80, a ring and a Seiko watch, in short, Sarjeet Singh was said to have played an active role in the robbery. However, the taxi driver gave evidence to the contrary — to the effect that the person who sat next to him (by necessary inference it must be Mustafa Ja'afar) had held the knife to his stomach. The taxi driver described the three robbers as Malays by relying solely on their dark skin complexion and the fact that they spoke in Bahasa Malaysia. At no time did the taxi driver identify the trio as the culprits. No evidence was led that there was in fact an identification parade organized by the police to enable the taxi driver to identify the trio. It is apparent that the necessity for holding an identification parade in this case was not appreciated by the police. The taxi driver testified that that night at the Chinese cemetery when he was told to alight from the taxi, the place was quiet and dark. This fact must have been known to the police before the case came up for hearing and, if known, the police should have been alerted as to the necessity of holding an identification parade. Under the darkness of the night, how could the taxi driver see and subsequently identify the trio? It was therefore no surprise at all that the taxi driver was not requested by the prosecuting officer to identify the trio in court on the day of the hearing. This was, indeed, an unsatisfactory feature of the case.

That night, the taxi driver must have been frightened. There was evidence that he was afraid that he would be murdered. Under such circumstances, the pertinent questions put by the Lord Chief Justice in the judgment of the Court of Appeal in *R v Turnbull & Ors*[1] especially at p 552 need to be referred to. They are as follows:

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?

Perusing through the notes of evidence, the taxi driver came nowhere near the sage observations of the Lord Chief Justice in *Raymond Turnbull & Ors*.[1]

In my judgment, the necessity of holding an identification parade can only arise where the accused persons are not previously known to the witnesses (see *Mehtab Singh & Ors v State of Madhya Pradesh*[2]). It follows, therefore, that where the accused persons are already known to the witnesses,

A the question of identification parade does not arise. Here, there was no evidence that the taxi driver knew the trio prior to the robbery. Therefore, the police should have conducted an identification parade and the failure to organize one gives rise to the lurking suspicion that if conducted, the taxi driver could not identify the trio. Non-holding of the test identification parade, though it may not be a ground to vitiate the trial, is undoubtedly a B very important feature in considering the credibility of the witnesses on the point of identification (see *Lajja Ram v State*[3] and *Awadh Singh v State*[4]).

So much for the identification parade.

Next, the question to consider is whether the learned magistrate was right in treating Mustafa Ja'afar, a material prosecution witness, as an C unreliable witness. Towards this end, Mr Gurbachan Singh for the first respondent went through the evidence with a fine-tooth comb. He referred to me, inter alia, the evidence which showed the character of Mustafa Ja'afar who admitted unashamedly that he lied while under oath. The transcript reads thus:

D Peguambela (1) : This shows you were dishonest to the court?
Mustafa Ja'afar : Ini saya tak berapa jujur. Saya mengaku saya bohong.
Peguambela (1) : Bohong atas sumpah?
Mustafa Ja'afar : Diam diri. Saya tak berapa boleh jawab soalan ini. Saya mengaku saya bohong atas sumpah.

E Thus, it is quite obvious that Mustafa Ja'afar lied in court for reasons best known to him and it was perfectly in order for the learned magistrate to hold him as an unreliable witness.

The learned deputy public prosecutor argued forcefully and sought to justify her submission that Mustafa Ja'afar was a perfectly reliable witness by relying on certain passages in the notes of evidence. With respect, those F passages heightened further the position of Mustafa Ja'afar as an unreliable witness.

Without a doubt Mustafa Ja'afar was an accomplice (*Goh Khiok Phiong v R*[5] and *Abdul Rahman v PP*[6]) and the court is entitled to presume that he is unworthy of credit unless he is corroborated in material particular. Although s 133 of the Evidence Act 1950 enacts that a conviction is not G illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, yet our courts have consistently held that the grounds of decision must reflect an awareness of the danger of so convicting (*Ng Yau Thai v PP*[7]). Corroboration of an accomplice's evidence need not mean independent corroboration of every factor of the case against the accused. H It is sufficient, in my judgment, if the corroboration corroborates some material part of the accomplice's story which identifies the accused with the offence charged and goes towards the identity of the accused. Lord Reading CJ aptly said it in *R v Baskerville*,[8] especially at p 667 thus:

I We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether

the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.

Further down the same page, Lord Reading CJ said:

> It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

In my judgment, the credibility of Mustafa Ja'afar who is in the position of an accomplice must be individually judged just as any other witness' — applying the same considerations but with an added ingredient that he is an accomplice. The court must take stock of the situation and consider who and what he is, his demeanour, bearing, the manner, quality and substance of his evidence in itself and in relation to all the circumstances of the case. The nature, quality and degree of Mustafa Ja'afar's complicity must be examined thoroughly. It goes without saying that though Mustafa Ja'afar is an accomplice, he is still a competent witness and as such is entitled to have his credibility judged in itself; his evidence must, as a whole, be weighed and examined and not just put aside unjudged and unconsidered just because he is an accomplice.

The learned magistrate considered the evidence of Mustafa Ja'afar in its entirety and came to the conclusion that he was an unreliable witness, and that even if there was corroboration, the evidence of Mustafa Ja'afar could not be corroborated. I cannot find any fault with the approach adopted by the learned magistrate. On this point, the Supreme Court of India in *Sarwan Singh v State of Punjab*[9] held that:

> ... before the court reaches the stage of considering the question of corroboration and its adequacy or otherwise, the first and initial and essential question to consider is whether even as an accomplice the approver is a reliable witness. If the answer to this question is against the approver then that is the end of the matter, and no question as to whether his evidence is corroborated or not falls to be considered.

I have examined this case in its proper perspective and I am unable to see any ground for interfering with the learned magistrate's decision. Appeal dismissed.

Appeal dismissed.

Reported by Anne Khoo